Kang Ka Heng v Ng Mooi Tee & Anor

HIGH COURT (TAIPING) — DIVORCE PETITION NO 33–73 OF 1999
VT SINGHAM JC
5 MAY 2001

Family Law *— Divorce — Damages against third party — Adultery — Principles to be considered — Whether petitioner connived or condoned act of adultery to disentitle her to claim damages*

Family Law *— Divorce — Adultery — Burden of proof — Beyond reasonable doubt — Claim against third party, whether proved*

The petitioner-husband filed a divorce petition against the respondent-wife on the ground that the marriage had irretrievably broken down and he found it intolerable to live with the respondent-wife. The respondent filed an answer to the petition and applied for the divorce petition to be dismissed as the ground alleged by the petitioner was not true. By an amended answer, the respondent-wife claimed damages against the woman named Yeoh Ah Hoon ('Y') as she claimed that the breakdown of the marriage was due to the adulterous relationship the petitioner-husband had with Y since January 1999. On 5 April 2001, when the case came up for hearing, both parties informed the court that the matter had been settled amicably between the petitioner and the respondent and applied to record consent order. Before the consent order was recorded, the petitioner's counsel applied to the court to permit the petitioner to give evidence on oath that the cause of the breakdown of the marriage was not due to his adulterous relationship with Y. The court allowed the petitioner to testify on oath. During his evidence, the petitioner admitted his adulterous relationship with Y and that a child was born on 14 April 2000 while his marriage with the respondent was still in existence. During the hearing of the respondent's claim for damages against Y, the respondent testified that prior to January 1999, the petitioner had been giving her a sum between RM700 to RM750 per month for herself and her three children but since the adulterous relationship with Y in January 1999, the petitioner did not provide her with any maintenance. She therefore claimed damages against Y based on RM750 per month from January 1999 till March 2001 being 27 months as her loss. The claim by the respondent was not contested by Y although she was served with the respondent's claim for damages. The issue for determination was whether the respondent was entitled to damages.

Held, allowing the respondent's claim for damages:

(1) An allegation of adultery must be proved to the satisfaction of the court beyond reasonable doubt. On the facts in this case, the court was satisfied beyond reasonable doubt that the

breakdown of the marriage was due to the adulterous relationship Y had with the petitioner while the marriage was still in existence and the respondent was entitled to damages as claimed (see pp 337G, 338A).

(2) Although the respondent did not take the initiative to file the divorce proceedings, there was no evidence that the respondent had connived or condoned the act of adultery by the petitioner to disentitle her to claim damages. The court was mindful that damages are awarded on the principle that they are compensatory for the respondent's loss and not as exemplary or punitive (see p 338D–E).

Per curiam:

Would-be adulterers, are reminded, be it a man or a woman that those who wish to flirt with the wife or husband of another person or commit adultery while the marriage is still in legal existence will have to face the legal consequences of having to pay damages if it is established that the cause of the breakdown of the marriage is due to the adulterous relationship. Marriage is a sacred union and parties should strive to maintain this sacred union for life as any breakdown in the marriage will have an adverse effect on the children who are innocent parties. Therefore, third parties should stay away from attempting to interfere or enter into any kind of immoral relationship with the wife or husband of another person which no doubt is likely to cause the breakdown of the marriage of a happily married couple (see p 340B–C).

[**Bahasa Malaysia summary**

Pempetisyen-suami telah memfailkan satu petisyen perceraian terhadap responden-isteri atas alasan bahawa perkahwinan mereka telah mengalami keruntuhan yang tidak dapat dipulihkan dan beliau mendapati ia tidak tertanggung olehnya untuk hidup bersama responden-isteri. Responden telah memfailkan satu jawapan kepada petisyen tersebut dan memohon untuk petisyen perceraian tersebut ditolak kerana alasan yang dikatakan oleh pempetisyen adalah tidak benar. Melalui jawapan yang dipinda, responden-isteri menuntut ganti rugi terhadap seorang wanita bernama Yeoh Ah Hoon ('Y') kerana beliau mendakwa bahawa keruntuhan rumahtangga mereka adalah disebabkan oleh perhubungan zina pempetisyen-suami dengan Y sejak Januari 1999. Pada 5 April 2001, apabila kes ini dihadapkan untuk perbicaraan, kedua-dua pihak memaklumkan kepada mahkamah bahawa perkara tersebut telah diselesaikan secara berbaik-baik antara pempetisyen dan responden dan memohon untuk direkodkan perintah persetujuan. Sebelum perintah persetujuan direkodkan, peguam pempetisyen telah memohon kepada mahkamah untuk membenarkan pempetisyen memberikan keterangan bersumpah bahawa sebab keruntuhan rumahtangga mereka bukan

disebabkan oleh perhubungan zina beliau dengan Y. Mahkamah membenarkan pempetisyen memberikan keterangan bersumpah. Semasa memberi keterangan beliau telah mengakui perhubungan zina beliau dengan Y dan seorang bayi telah dilahirkan pada 14 April 2000 semasa perkahwinan beliau dengan responden masih wujud. Semasa perbicaraan tuntutan ganti rugi responden terhadap Y, responden telah memberikan keterangan bahawa sebelum Januari 1999, pempetisyen telah memberikan beliau jumlah antara RM700 hingga RM750 sebulan untuk dirinya dan tiga orang anaknya tetapi sejak perhubungan zina dengan Y dalam bulan Januari 1999, pempetisyen tidak memberinya apa-apa nafkah. Beliau dengan itu telah menuntut ganti rugi terhadap Y berdasarkan RM750 sebulan daripada bulan Januari 1999 hingga Mac 2001 iaitu 27 bulan sebagai kerugian beliau. Tuntutan oleh responden tidak dipertikaikan oleh Y walaupun beliau disampaikan dengan tuntutan responden untuk ganti rugi tersebut. Persoalan yang perlu ditentukan adalah sama ada responden berhak kepada ganti rugi tersebut.

Diputuskan, membenarkan tuntutan ganti rugi responden:

(1) Satu dakwaan zina mestilah dibuktikan untuk memuaskan mahkamah melampaui keraguan yang munasabah. Berdasarkan fakta-fakta kes ini, mahkamah berpuas hati melampaui keraguan yang munasabah bahawa keruntuhan rumahtangga tersebut disebabkan oleh perhubungan zina Y dengan pempetisyen semasa perkahwinan tersebut masih wujud dan responden berhak terhadap ganti rugi sebagai mana dituntut (lihat ms 337G, 338A).

(2) Walaupun responden tidak mengambil usaha untuk memfailkan prosiding perceraian, tiada terdapat keterangan di mana responden telah bersubahat dan membiarkan perbuatan zina oleh pempetisyen berlaku untuk tidak melayakkan beliau menuntut ganti rugi. Mahkamah sedar bahawa ganti rugi diberikan berdasarkan prinsip bahawa ia adalah bayaran pampasan terhadap kerugian responden dan bukan sebagai teladan atau punitif (lihat ms 338D–E).

Per curiam:

Peringatan diberikan kepada mereka yang ingin berzina, lelaki maupun wanita bahawa mereka yang berhasrat untuk bermain cinta dengan isteri atau suami orang lain atau melakukan zina semasa perkahwinan masih wujud akan berhadapan dengan akibat undang-undang untuk membayar ganti rugi jika ia dapat dibuktikan bahawa sebab keruntuhan rumahtangga disebabkan oleh perhubungan zina tersebut. Perkahwinan adalah satu penyatuan yang suci dan kedua-dua pihak sepatutnya berusaha untuk mengekalkan penyatuan suci ini seumur hidup kerana apa-apa keruntuhan rumahtangga akan mempunyai kesan yang buruk ke atas anak-anak yang merupakan

pihak yang tidak bersalah. Oleh itu, pihak ketiga hendaklah menjauhkan diri daripada cuba untuk mengganggu atau terlibat dalam apa-apa bentuk perhubungan tidak bermoral dengan isteri atau suami orang lain yang tidak boleh dinafikan akan berkemungkinan menyebabkan keruntuhan rumahtangga satu pasangan berkahwin (lihat ms 340B–C).]

Notes

For cases on adultery, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2725–2737.

Cases referred to

Bastable v Bastable [1968] 1 WLR 1684 (refd)
Butterworth v Butterworth & Engle Field [1920] P 26 (refd)
'J' Greaves v Greaves [1948] WN 199 (refd)
Menon v Menon and Warth [1936] 1 All ER 900 (refd)
Leow Kooi Wah v Philip Ng Kok Seng & Anor [1997] 3 MLJ 133 (refd)
'6' Pritchard v Pritchard [1966] 3 All ER 601 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 53(1), 54(1)(a), (b), (c), (d), 58(3)(b)

KB Harry Koay (*Harry Koay & Co*) for the petitioner.
KK Yeow (*Yeow & Co*) for the respondent.
Yeoh Ah Hoon not represented.

VT Singham JC. : This is a claim by the respondent-wife, Ng Mooi Tee, for damages against the woman named Yeoh Ah Hoon ('Y') in the amended answer, encl 70 to the petition for divorce, encl 5 which was filed by the petitioner-husband Kang Ka Heng on 2 December 1999. The respondent-wife claimed that the breakdown of the marriage was due to the adulterous relationship the petitioner-husband had with the woman named Yeoh Ah Hoon.

Before this court proceeds with the respondent's claim, it is useful to state briefly on the divorce proceedings. The petitioner-husband filed a divorce petition dated 2 December 1999 against the respondent-wife on the ground that the marriage had irretrievably broken down and he finds it intolerable to live with the respondent-wife. The petition for divorce was filed pursuant to s 53(1) to be read with s 54(1)(a)–(d) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), which reads as follows:

Section 53(1)

Each party to a marriage may petition for a divorce on the ground that the marriage has irretrievably broken down.

Section 54(1)(a)—(d)

(1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say —

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

The petitioner stated that he was married to the respondent on 3 May 1987 at the Buddhist Association, Taiping and continued to live with the respondent at Taiping. They have three children of the marriage aged 11 years, six years and four years old.

The petitioner claimed for the following relief:

(a) the marriage be dissolved;

(b) custody of the children be given to the respondent-wife;

(c) costs of the proceedings be paid by the petitioner-husband.

However, the respondent filed an answer to the petition and applied for the divorce petition to be dismissed as the grounds alleged by the petitioner was not true. She alleged that the petitioner did not provide a matrimonial home since the date of the marriage and the respondent and the children were forced to live with the parents of the petitioner. She alleged that the petitioner was not responsible towards the family and failed to provide for the household expenses and the children since January 1999. She also stated that the petitioner was living with another woman, Y since 1999 and had committed adultery. She contended that the breakdown of the marriage was due to his adulterous relationship with Y.

By an amended answer to the petition, the respondent included the woman named Y as a party to the proceedings pursuant to an order of court dated 19 January 2001 and alleged that the breakdown of the marriage was because the petitioner has committed adultery with the said woman Y and a son was born on 14 April 2000.

The respondent sought the following reliefs:

(a) that the marriage be dissolved on the grounds of adultery by the petitioner with Y;

(b) that the petitioner be ordered to pay maintenance to the respondent and the children;

(c) that the respondent be given custody of the three children;

(d) that the marriage assets be divided equally;

(e) that the woman named Y be ordered to pay damages to the respondent for the breakdown of the marriage;

(f) that the costs of the proceedings be paid by the petitioner.

The petitioner filed a reply to the amended answer of the respondent wherein he denied that the breakdown of the marriage was due to the adulterous relationship with Y. He maintained that the respondent had always quarreled with him and showed hatred to his parents that he found it intolerable to live with the respondent.

On 10 March 2001, when the case came out for hearing, the petitioner's counsel applied for an adjournment to obtain further instructions from his client with a view towards a settlement. The case was postponed to 5 April 2001 for hearing.

On 5 April 2001, when the case came out for hearing, both parties informed the court that the matter has been settled amicably and applied to record consent order. In the meantime, before the consent order was recorded, the petitioner's counsel applied to the court to permit the petitioner to give evidence on oath that the cause of the breakdown of the marriage was not due to his adulterous relationship with Y. The respondent's counsel had no objection to the said application. The court allowed the petitioner to testify on oath. During his evidence, the petitioner admitted his adulterous relationship with Y and that a child was born on 14 April 2000, while his marriage to the respondent was still in existence. However, the petitioner maintained that the breakdown of the marriage was due to the frequent quarrels the respondent had with the petitioner since the time of the marriage, and the respondent had always showed hatred to his parents. He said that he was presently unemployed and Y gives him RM200 per month for his expenses.

By consent, the following orders were made by this court:

(a) that the marriage be dissolved and decree nisi be made absolute in three months;

(b) that custody of the eldest child, Kang Chee Leong be granted to the petitioner and the custody of the remaining two children be given to the respondent and reasonable access be given to both parties;

(c) the petitioner to pay the agreed sum of RM500 per month as maintenance to the respondent and the two children with effect from 5 April 2001;

(d) the marriage assets be divided equally between the petitioner and the respondent;

(e) the costs of the proceedings be borne by the petitioner.

As the respondent had maintained that the breakdown of the marriage was due to Y's adulterous relationship with the petitioner which had resulted in the divorce, her counsel informed the court that the respondent wished to proceed with her claim for damages against Y and applied for another date. The case was fixed for continued hearing on 10 April 2001. The petitioner's counsel informed the court that he was not representing Y.

Damages for adultery

On 10 April 2001, during the hearing of the respondent's claim for damages against Y, the respondent testified that the breakdown of the marriage with the petitioner was due to the adulterous relationship Y had with the petitioner since January 1999 while her marriage to the petitioner was still in existence which had resulted in the divorce. She also testified that prior to January 1999, the petitioner has been giving her a sum between RM700 to RM750 per month for herself and her three children but since the adulterous relationship with Y in January 1999, the petitioner did not provide her with any maintenance. She therefore claimed damages against Y based on RM750 per month from January 1999 till March 2001 being 27 months as her loss. The claim by the respondent against Y was not contested although she was served with the respondent's claim for damages. The court fixed its decision to 30 April 2001 on the claim for damages after hearing the evidence of the respondent and submissions from her counsel. The respondent did not seek any damages against the petitioner for the breakdown of the marriage due to his adulterous relationship with Y.

It is important to observe that the respondent's unchallenged evidence was that the breakdown of the marriage with the petitioner was due to the adulterous relationship Y had with the petitioner as from January 1999 while the marriage was still in existence. On the other hand, the petitioner having admitted the adulterous relationship with Y had denied that the breakdown of the marriage was due to the adulterous relationship with Y. He maintained that it was due to the frequent quarrels the respondent had with him and his parents since the time of the marriage and this evidence was challenged by the respondent's counsel during the cross-examination of the petitioner when he testified during the divorce proceedings on 14 March 2001.

As stated above, the court granted the divorce on 14 March 2001 and ordered the petitioner to pay maintenance of the agreed sum of RM500 per month to the respondent and the two children with effect from 5 April 2001. The petitioner agreed to pay for the costs of the proceedings. Decree nisi was granted to be made absolute in three months from the date of this order.

Burden of proof of adultery

It is settled law that an allegation of adultery must be proved to the satisfaction of the court beyond reasonable doubt. In *Rayden on Divorce* (12th Ed) at p 193, it is said 'The burden of proof is throughout on the person alleging adultery, there being a presumption of innocence.

In *Bastable v Bastable* [1968] 1 WLR 1684 at p 1687 Wilmer LJ said:

> True it is not a criminal offence; it is a matrimonial offence. It is for the husband petitioner to satisfy the court that the offence has been committed. Whatever the popular view may be, it remains true to say that in the eyes of the law the commission of adultery is a serious matrimonial offence. It follows, in my view, that a high standard of proof is required in order to satisfy the court that the offence has been committed.

On the facts in this case, this court is satisfied beyond reasonable doubt that the breakdown of the marriage was due to the adulterous relationship Y had with the petitioner while the marriage was still in existence and the respondent is entitled to damages as claimed based on the following facts:

(a) the petitioner's admission of his adulterous relationship with Y during the existence of his marriage with the respondent;

(b) the petitioner's admission that a child was born on 14 April 2000 out of his adulterous relationship with Y;

(c) the petitioner's admission was supported and confirmed with the production by the respondent of the birth certificate of the child stating the petitioner as the father and Y as the mother and which was marked as exh D1;

(d) the evidence of the respondent that their relationship became strained only after Y came into the scene in January 1999;

(e) Y who was served with the respondent's claim for damages against her did not contest the claim.

In this case, it is the view of this court that although the respondent did not take the initiative to file the divorce proceedings, there is no evidence that the respondent had connived or condoned the act of adultery by the petitioner to disentitle her to claim damages. This court is mindful that damages are awarded on the principle that they are compensatory for the respondent's loss and not as exemplary or punitive (see *'J' Greaves v Greaves* [1948] WN 199; *'6' Pritchard v Pritchard* [1966] 3 All ER 601). In fact, s 58(3)(b) of the said Act gives the discretion to the court to grant 'such damages as it thinks fit, but so that the award shall not include any exemplary or punitive elements.'

As to the claim for damages, this court finds as a fact and in law that the respondent had suffered financial loss and that she is entitled to damages due to the adulterous relationship Y had with the respondent's husband which caused the breakdown of the marriage. The damages is assessed on the sum of RM750 per month for 27 months being January 1999 till March 2001 as submitted by the respondent's counsel as loss of maintenance. This court awards a sum of RM20,150 as damages to the respondent against Y.

In *Menon v Menon and Warth* [1936] 1 All ER 900, Sir Boyd Merriman P said:

> Damages do not follow from adultery as a matter of course, and it is common knowledge that in this court, claims for damages are comparatively rare. There is nothing discreditable about claiming damages, but anybody who seeks to claim damages must prove that there is a proper case for damages, and prove it upon the basis, not that you are punishing a man because he has committed adultery with the wife, but because the husband can put into an intelligible form before a jury that he has suffered some money loss as a result of the adultery which a jury can fairly assess in figures as a basis for a claim for damages. Amongst other things, of course, to be taken into consideration in the question of a claim for damages is the relations between the husband and the wife. Was this a perfectly happy home which was broken up by the actions

> of the adulterer, or was there already a state of things which was not perfect, not the ideally happy married life. The actual relations between the husband and the wife you will naturally consider at the time when the co-respondent came upon the scene.

The principle to be applied in assessing damages against an adulterer is summarized in the headnote in *Butterworth v Butterworth & Engle Field* [1920] P 26:

> Damages, if any, have always been compensatory only and not exemplary or punitive. The grounds on which damages are given are: (i) the actual value of the wife lost; (ii) compensation to the husband for the injury to his feeling, the blow to his honour, and hurt to his family life. The value of the wife has two aspects: (i) pecuniary; and (ii) what may be called the consortium aspect: (i) depends on her fortune and her ability and assistance in the home or business; and (ii) depends upon her character and abilities as wife or mother. The conduct of the adulterer has little bearing on (i), but may be very relevant as to (ii), as an aid to estimating the value of the wife, eg, the ease which he effected his purpose may show that the wife was of small value. His conduct may also be relevant in estimating, the injury to the husband's feelings. The husband's own character and conduct are, on a claim for damages, as fully in issue as that of his wife. The amount of compensation cannot depend on the wealth or poverty of the co-respondent, but the way in which he has used his wealth in gaining his may be relevant in the same way as his conduct generally. Both the rank and fortune of the co-respondent are relevant for consideration in so far as either may give assistance in ascertaining the value of the wife, or measuring the extent of the injury inflicted on the husband.

In *Leow Kooi Wah v Philip Ng Kok Seng & Anor* [1997] 3 MLJ 133 at p 150, His Lordship Mahadev Shankar J (as his Lordship then was) said:

> 'Excluding the exemplary and punitive elements seems to mean that the court must exclude all concerns for moral or social outrage. What is left is compensatory damages. This is rooted in the duty of the court to restore the petitioner and the children, so far as money can, to the life they would have enjoyed if the break-up had not occurred. But who is to say how this family would have developed if Fifi had not come into their lives? This must be why the quantum has been left to the discretion of the court. Therefore, such awards must be necessity and be treated as decisions on their special facts.' In this case, His Lordship Mahadev Shankar J awarded a sum of RM50,000 against the co-respondent on the facts in that case.

This court did not award any damages against the petitioner as the respondent did not make any such claim, and this court cannot on its own volition initiate such a claim unless there is a claim by the respondent. Nevertheless, the petitioner has agreed to pay for the costs of the proceedings which shows that he was not let off without any order for payment in the claim for damages against Y and in the circumstances no order for costs was made against Y.

As to the costs of this proceedings, the law on the issue of costs and the circumstances as in the present case is clearly set out in 13 *Halsbury's Laws of England* (4th Ed) para 970 which reads as follows:

A co-respondent, against whom adultery is established, may be ordered to pay the whole or any part of the costs of the proceedings; but in exercising its discretion as to the costs which a co-respondent may be ordered to pay, the court may have to consider whether in fact the co-respondent was responsible either for the breakdown of the marriage or for the litigation.

Be that as it may, this court wishes to take this opportunity to send a reminder to would be adulterers, be it a man or a woman that those who wish to flirt with the wife or husband of another person or commit adultery while the marriage is still in legal existence will have to face the legal consequences of having to pay damages if it is established that the cause of the breakdown of the marriage is due to the adulterous relationship. Marriage is a sacred union and parties should strive to maintain this sacred union for life as any breakdown in the marriage will have adverse effects on the children who are innocent parties. Therefore, third parties should stay away from attempting to interfere or enter into any kind of immoral relationship with the wife or husband of another, which no doubt is likely to cause the breakdown of the marriage of a happily married couple.

Accordingly, the respondent is awarded damages in the sum of RM20,150 with no order as to costs against her. The petitioner is ordered to pay the costs of this proceedings as agreed.

Respondent's claim for damages allowed.

Reported by Moy Saw Han